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The Canadian Competition Act: A Leap Forward**

With the adoption of its new Competition Act (the Act) and the related Competition Tribunal Act[1] Canada took a giant leap forward in the regulating of restrictive trade practices and of monopolistic mergers and acquisitions. Although the bulk of the legislation took effect on June 19, 1986, the all-important chapter dealing with prenotifiable mergers was only proclaimed on July 15, 1987.

In 1986, over 1,100 mergers and acquisitions occurred in Canada. Of these, 67 percent were undertaken by foreign firms, especially American ones.[2] The internationalization of markets and the establishment of free trade between Canada and the United States will probably increase this trend. Free trade is expected to encourage more American companies to establish Canadian branches. It also is anticipated that firms from other countries will seek a Canadian base as a gateway to United States markets.[3] It therefore is important that nondomestic businesses and their legal counsel be aware of the Act.

The major amendments that the Act brings to the previous Combines Investigation Act[4] fall into several categories. The first category involves

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1. Can. Stat. ch. 26 (1986) is divided into two parts. Part I is the Competition Tribunal Act. Part II, the Competition Act, amends Can. Rev. Stat. ch. C-23 (1970), *amended by* Can. Rev. Stat. ch. 10 (Supp. 1, 1970), Can. Rev. Stat. ch. 10 (Supp. 2, 1970), *further amended by* ch. 76, 1974–76 Can. Stat. and ch. 28, 1976–77 Can Stat. [hereinafter Act].

2. Tremblay, *Les Fusions et Acquisitions Donnent Naissance a une Nouvelle Industrie*, La Presse, Sept. 19, 1987, at A10, col. 1.

3. Cook, *How We Hurt Ourselves on Foreign Investment*, The Globe and Mail, Nov. 5, 1987, at B2, col. 2.

4. Combines Investigation Act, Can. Rev. Stat. ch. C-23 (1970).

anticompetitive practices that are reviewable by a tribunal created for that purpose. Anticompetitive activities include predatory pricing, vertical price squeezing, and the use of fighting brands.[5] The second category deals with large-sized mergers that cannot go forward without the prior approval of the Director of Investigation and Research (the Director). If the Director finds that the proposed merger is likely to lessen competition substantially, he must then apply to the Competition Tribunal to block it.[6] Although the mergers section has only been in force for a fairly short time, the cases to date shed light on the impact of these provisions. The third category, which deals with modifications to the conspiracy offenses and the related exemptions is relevant to those carrying on business in Canada.

This article discusses the legislative changes introduced by the Act and the effect that these amendments are likely to have upon foreign and domestic firms currently carrying on business in Canada or planning to do so.

I. The Competition Tribunal

The investigation of anticompetition practices, proposed mergers, and day-to-day administration is performed by the Director and the Bureau of Competition Policy (the Bureau). Adjudication, however, is handled by a specialized tribunal (the Tribunal) made up of federal court judges and laypersons.[7] Seven out of a maximum of twelve members have been appointed to this hybrid body—four judges and three laypersons.[8] Given the frequent reference to broad economic and commercial concepts within the definition of anticompetitive activities, the addition of economic and business expertise to this adjudicative body is a welcome choice. The Canadian Government has indicated that it hopes that these laypersons will help the Tribunal respond to the social and economic reality of today's business world.[9]

5. Act, *supra* note 1, § 50.

6. *Id.* pt. VIII, § 64.

7. *Id.* pt. VII; Competition Tribunal Act, *supra* note 1, § 3.

8. *Two Lay Members Appointed to Competition Tribunal*, 8 CAN. COMPETITION POL'Y REC., pt. 3, at 2 (1987); *Judicial Appointments Are Made to the Competition Tribunal*, 7 CAN. COMPETITION POL'Y REC., pt. 3, at 12 (1986); *Lay Member Appointed to the Competition Tribunal*, 7 CAN. COMPETITION POL'Y REC., pt. 3, at 13 (1986). The lay members of the Tribunal consist of a financial consultant, an economist who had been a member of the previous Restrictive Trade Practices Commission, and a law professor with expertise on the impact of economics on law and regulations.

9. CONSUMER AND CORPORATE AFFAIRS CANADA, COMPETITION LAW AMENDMENTS: A GUIDE 11 (1985) [hereinafter GUIDE].

According to Section 10 of the Competition Tribunal Act, all proceedings, other than applications for interim orders, must be heard by a minimum of three and a maximum of five tribunal members. At least one must be a laymember and at least one a judge. Questions of fact and of mixed fact and law are decided by all members, while matters of law alone are decided by judicial members only.[10] All decisions, other than those based on points of fact only, are fully appealable to the Federal Court of Appeal.[11] The first decision rendered by the Tribunal indicates that it may interpret the Act strictly. In the case of the *Director of Investigation & Research v. Palm Dairies Ltd.* the Tribunal blocked the sale by Unicorp Canada Corporation of Palm Dairies Ltd. to four Western dairy cooperatives on the basis that the sale would substantially lessen competition, an anticompetitive practice.[12] Indeed, this decision, together with the expense and time involved in a possible court case, already has led some firms to consult the Director and arrive at settlements before legal proceedings are started.[13]

II. Anticompetitive Practices

A. Abuse of Dominant Position

According to the Act, a dominant position exists when any one or more persons control, completely or substantially, a class or type of business throughout Canada or an area thereof. The Act sets out a nonexhaustive list of activities that are considered to be anticompetitive when practiced by firms dominant in a given market. These provisions are especially relevant to the pricing, product line, promotion, and distribution strategies of Canada's many oligopolies, of which the oil and gas, liquor and beverage industries are but a few examples.[14] To be objectionable, the anticompetitive behavior of the dominant firm must be shown to substantially lessen competition, or be likely to do so.[15]

Some clarifications are necessary. A corporation that controls 15 percent of the market may not by itself dominate the market. If, however,

10. Act, *supra* note 1, § 12.

11. *Id.* § 13.

12. Competition Tribunal [C.T.] 1 (1986); Hunter, *Competition Tribunal Weighs in on First Merger Case*, 7 Can. Competition Pol'y Rec., pt. 4, at 1 (1986); Oxtoby, *Dairy Truce Declared*, Fin. Times Can., Jan. 12, 1987, at 3, col. 1 [hereinafter Oxtoby (1987)]; Oxtoby, *First Test for Competition Tribunal*, Fin. Times Can., Oct. 6, 1986, at 1, col. 5.

13. Hatter, *Safeway Bows to New Competition Act*, Fin. Post, May 25, 1987, at 4, col. 1.

14. Shenfeld & Tanny, *Competition Act Looks at Efficiency*, Fin. Post, Mar. 9, 1987, at 19, col. 2; Lamphier, *Reversing the Trust-Busting Roles*, Fin. Times Can., Mar. 3, 1986, at 2, col. 1.

15. Act, *supra* note 1, § 51.

that firm and competitors with similar market shares practice parallel pricing so as to discourage new competitors from entering the market, they may be deemed to control the market.[16] Since the Act does not define what constitutes control amongst independent firms, it probably would be necessary to show some sort of concerted action or tacit understanding between them.[17]

Pursuant to the Act, anticompetitive practices include a dominant firm or firms selling goods at a price that is lower than the acquisition cost (predatory pricing) or introducing a fighting brand on a temporary and selective basis. The purpose of such behavior must be to eliminate or discipline a competitor.[18] Selling a product below cost will not per se demonstrate predatory intent. Thus, noncost factors must also be considered.[19]

A large soft-drink bottler that repeatedly brings out a new flavor—that is, a fighting brand—within a given region, in response to a local bottler's specialties, might well be contravening the Act, especially if it stops making that flavor after the local bottler has withdrawn from the region. Although, by definition, a fighting brand is one that a company has brought onto the market to compete directly against another firm's product, the distinction must be made between fending off a competitor and attempting to destroy it. The issue is one of both intention and degree.

Major players in the petroleum industry may dream of eliminating one another by introducing a single fighting brand at the gas pumps, but they are not likely to succeed. A major petroleum corporation does not usually depend on just one brand of gas or product line for its revenue. On the other hand, introducing one fighting brand may be sufficient to knock out a small-time competitor who does not have other brands or a wide product line to fall back on.

Yet, even if the objective is to discipline or eliminate the small competitor, the use of predatory pricing or of a fighting brand still may not contravene the Act. A one-time activity is not in itself anticompetitive. It must be shown to be a practice. Thus, it is possible that a suit under the Act could be brought where a dominant corporation destroys a second or third small firm. Repetition of the behavior is likely to strengthen the presumption that the intention was not defensive. The Act, however, does not define the word *practice*. The frequency, duration, and extent of the

16. Gherson, *Reining in Mergers*, Fin. Post, Dec. 28, 1985, at 2, col. 2.

17. Stanbury, *The New Competition Act and Competition Tribunal: Not with a Bang But a Whimper*, 12 CAN. BUS. L.J. 2, 31 (1986).

18. Act, *supra* note 1, §§ 50(d), 50(i).

19. Grover & Kwinter, *The New Competition Act*, 66 CAN. B. REV. 267, 294 (1987).

activity required to make it a practice under section 50 has yet to be determined. Under previous legislation the term *practice* was given a wide range of interpretations. Based on case law, one commentator has noted that a practice requires repetitive acts for a period of time. On the other hand, *practice* has also been interpreted to mean almost any act done more than once in a short period. This uncertainty made convictions for such things as illegal trade practices difficult.[20]

To be objectionable, the anticompetitive behavior must also be shown to lessen competition or be likely to do so.[21] Market research or analysis may demonstrate that competition has been reduced in the past. It may be far more difficult, however, to prove that an anticompetitive practice is likely to lessen competition in the future. For example, in the computer hardware and software industries, product life tends to be short and a future loss of market share may be more a question of obsolescence than of anticompetitive activities by other players. Indeed, product innovation, an improved distribution network, economies of scale, and other like examples of superior competitive performance are recognized defenses under the Act.[22] In its guide to the Act, the Department of Consumer and Corporate Affairs Canada suggests that: "If competitors fall from the market because a dominant competitor is more effective in meeting consumer needs, this is not an abuse of power, but rather a natural consequence of the competitive process."[23]

These defenses are well-justified. Unfortunately, they may offer large, highly profitable firms, the handy excuse that poor performance by competitors is in itself proof of a dominant firm's superior performance.[24] It must be hoped that the Tribunal and Director will not be easily swayed by such arguments.

Apart from the practices described above, the following are deemed to involve an abuse of a dominant position when the objective is to prevent or impede entry into or expansion within a market, or to eliminate a competitor therefrom:

- Vertical price squeezing is an offense relative to the situation in which a supplier to, for example, both the wholesale and retail markets raises its wholesale price while holding the retail price constant. The unintegrated retail competitor might then be forced to hold or decrease its own selling price, thereby squeezing its profit margin.

20. Stanbury, *supra* note 17, at 32.
21. Act, *supra* note 1, § 51.
22. *Id.* § 51(4).
23. GUIDE, *supra* note 9, at 22–23.
24. Stanbury, *supra* note 17, at 33.

- A vertical acquisition or merger with a customer or supplier so as to prevent a competitor from gaining access to that customer or supplier.
- Adopting product specifications that are incompatible with products produced by another person. Eastman Kodak Company's manufacturing of a new film format that was compatible only with its own new camera represents a good example of this type of activity.
- Freight equalization on a competitor's plant.
- Requiring or inducing a supplier either to sell only, or primarily, to certain customers or to refrain from selling to a competitor.
- Preempting scarce resources or facilities required by a competitor.
- Finally, buying up products to prevent price levels from eroding also constitutes an abusive practice.[25]

The sanction for abusive practices involves the issuance of an order by the Tribunal prohibiting the firm or firms from continuing the anticompetitive activity. If such an order is not likely to restore competition, then the Tribunal can require divestiture of shares or assets.[26] The breakup of a dominant firm may, however, at times, be a difficult trade-off. For example, trade barriers have encouraged foreign investors to establish branch plants to service local markets. In a variety of manufacturing industries, for example, food processing and consumer products, major firms, due to the importance of economies of scale, often have been few in number and therefore dominant. Active intervention to break up these businesses may lead to an increased number of competitors, but not without a loss of economies of scale. In such a situation, excess production costs could outweigh the benefits of creating a more competitive market.[27]

In the longer run, the reduction and subsequent elimination of various trade barriers as a result of both Canada-U.S. free trade and the globalization of markets, should expose Canadian companies to greater competition. Ultimately, these developments should "permit large-scale firms to operate in Canada without dominating the domestic market."[28] In turn, this situation will reduce the need for intervention by the Director and the Tribunal.

B. Delivered Pricing

Abusive practices can occur not only when competition is stiff, but also when there is little or no competition in a given area. Under section 62 of the Act, "delivered pricing" involves the practice of refusing a cus-

25. Act, *supra* note 1, § 50; *see* Grover & Kwinter, *supra* note 19, at 289–96.
26. Act, *supra* note 1, § 51(2).
27. Shenfeld & Tanny, *supra* note 14.
28. *Id.*

tomer, or potential customer, delivery of an article, at any place where the supplier engages in the practice of delivering that article to any other customer, on the same trade terms—that is, volume, payment terms, technical and service requirements—as would be available to the first customer if its place of business were located in that place.

In geographical zones that have few or no competitors, a supplier may charge higher prices or require higher volume purchases than in areas where competition is strong. There can be a number of reasons for this. For example, transportation costs or the lack of economies of scale may make it more expensive to supply that area. Prices in the Canadian far north are frequently much higher for just such reasons. A customer might then find that it is more economical to purchase the product from the supplier in an area where the price or minimum volume is lower. Failure by a supplier to allow a customer, or potential customer, to do so could contravene the Act. No offense can occur, however, if the customer can obtain the product, in his own district from another supplier at a better price or with a lower minimum volume.[29] The concept of "delivered pricing" therefore takes into account Canadian demography, namely, a relatively small population spread over a vast area, concentrated in a limited number of major cities.

To be considered an offense, the delivered pricing practice must be shown to have been engaged in by a major supplier or be found to be a widespread practice in the market in question. Although it might be easy to demonstrate that a firm is a major supplier, for example, on the basis of its market share, it may not be so simple to prove that a smaller supplier has committed an offense by participating in a widespread practice. As mentioned earlier, the term *practice* has not been defined. Adding the term *widespread* adds an element of degree without providing any criteria for arriving at an appropriate meaning. Indeed, given the complexity of the relevant sections of the Act, the chances of obtaining an order prohibiting this practice may be minimal.[30]

The Act also sets out a number of legitimate defenses to a claim of delivered pricing. First, owners and registered users of a trademark are entitled to practice delivered pricing if they can show that delivery in another zone would affect quality standards. For example, a registered user may not have adequate pre- and post-sale servicing in that area.[31] Second, a supplier cannot be forced to make large investments in plant and equipment in order to supply the customer. For instance, if the output

29. Act, *supra* note 1, §§ 52, 53; GUIDE, *supra* note 9, at 24.
30. Stanbury, *supra* note 17, at 37.
31. Act, *supra* note 1, § 53(2); GUIDE, *supra* note 9, at 24.

from a given plant is already fully taken up by long-standing customers in that region, the manufacturer cannot be forced to expand the plant merely to accommodate a new customer when it can supply the latter from another, though more costly, plant.[32]

The offense of delivered pricing and accompanying defenses reflect the Act's competing purposes. The Act is supposed to prevent abuse by firms that dominate a market. On the other hand, the Act is not supposed to strangle reasonable business practices.

III. Mergers

A. Definition and Affected Parties

While the U.S. government under the Reagan administration has substantially relaxed its enforcement of U.S. antimerger laws, Canada has been toughening its rules.[33] The antimerger provisions of the Act represent a concern to Canadian businesses and future investors alike. First, the definition provided as to what constitutes a merger is extremely broad. A merger is:

> The acquisition or establishment, direct or indirect, by one or more persons, whether by purchase or lease of shares or assets, by amalgamation or by combination or otherwise, of control over or significant interest in the whole or a part of a business of a competitor, supplier, customer or other person.[34]

The fact that the Act encompasses vertical, as well as horizontal amalgamations affects both domestic and foreign franchisers. When a Canadian franchisee's contract is not renewed due to unsatisfactory performance, the franchiser may decide to operate the franchise itself. Technically, such a transaction (and indeed the mere granting of a franchise) constitutes a merger. Should the former franchisee or another firm that has been denied a franchise, feel that competition has been lessened by the franchiser's actions, it could lodge a complaint with the Director. The Director, in turn, could decide to investigate and bring suit before the Tribunal. Such suits are quite commonplace under the equivalent U.S. legislation.[35]

The Act also could prevent the merger of Canadian subsidiaries that results from a merger of their nondomestic parents. For instance, had the merger provisions been in place in 1985, the acquisition of tea producer, Brooke Bonds, Inc., by Unilever Ltd. (which in turn owns J. Lipton

32. Act, *supra* note 1, § 53(2); GUIDE, *supra* note 9, at 24.

33. Lamphier, *supra* note 14. Fourteen out of fifteen of the largest mega-mergers in American history have occurred during the Reagan era.

34. Act, *supra* note 1, § 63.

35. Breckenridge, *Franchisers Assail Ottawa's Plan for New Competition Act*, The Globe and Mail, Jan. 17, 1986, at B6, col. 1.

Company, a tea producer) might have been blocked due to a substantial lessening of competition.[36]

Furthermore, the Act, including the merger provisions, is for the first time applicable to banks and Crown Corporations. With few exceptions, banks are treated in the same fashion as any other financial institution.[37] The inclusion of banks and Crown Corporations reflects Canada's moving towards privatizing Crown Corporations and deregulating its financial industry.

B. Substantial Lessening of Competition

The Act provides that a merger is objectionable only if it prevents or substantially lessens competition.[38] In adopting this criterion, Canada has followed the lead of many other countries, including the United States and Japan.[39] The Act requires that the competitive situation both before and after the merger be considered. During the extensive consultations with the business community that preceded introduction of the Act, businesses argued that the amount of competition that existed before the merger was irrelevant. They proposed a different test, namely, whether the degree of competition after the merger remained at a healthy, though reduced, level. One of the dangers of such a post-merger test would be the tendency to establish a present level of adequate competition to apply across industries. Yet, what is appropriate in one industry may not be relevant in another. It is difficult, for example, to imagine judging competition levels in the hi-tech sectors of computers and electronics on the same basis as more traditional industries such as agriculture. Moreover, in assessing a business sector, it is unlikely that the Tribunal or the Bureau could develop an adequate picture merely by looking at a post-merger snapshot. In fact, no country as yet appears to have accepted this type of post-merger test.[40]

Section 65 of the Act sets out a number of factors, or guidelines, that may be considered by the Tribunal in determining whether competition has been extinguished or substantially reduced. These factors serve as guidelines for comparing the status of a given market in the past and in the future, both with and without the merger actually occurring. The

36. Lamphier, *supra* note 14.

37. Act, *supra* note 1, §§ 2.1, 32(6.1), 33; Banks and Banking Law Review Act, Can. Stat. ch. 40, § 255(5) (1980–1983).

38. Act, *supra* note 1, § 64(1).

39. Guide, *supra* 9, at 16.

40. *Id.*; Oxtoby, *Competition Act Gets Final Look*, Fin. Times Can., Apr. 21, 1986, at 4, col. 2; Anderson, *Competition Bill Felt Step Forward*, The Globe and Mail, Jan. 14, 1986, at B2, col. 5.

Tribunal may, for instance, consider the probability that one of the parties will fail, in whole or in part, if the proposed union does not take place.[41] The loss of competition and of employment resulting from a bankruptcy might well outweigh the impact of the merger. The acquisition by Falconbridge Ltd. of Kidd Creek Mines Ltd. offers a good example, even though it took place before the Act was in force. Prior to the takeover, both of these mining firms were relatively weak. Although employment at Kidd Creek dropped substantially after the acquisition, Falconbridge's position was strengthened internationally and Kidd Creek was placed under good management. One commentator has noted that, "As one company, it is strong, as two each would have been weak . . . [and] the cost would have been much higher down the road."[42] Without the takeover it is possible that at least one, if not both, of the companies might have ultimately laid off many workers.[43]

Conversely, the Tribunal must weigh the probability that a merger would lead to the demise of a vigorous and effective competitor.[44] In a hi-tech industry, a merger may be the only way for a company to gain access to the crucial innovation required to stay competitive. This innovation might then lead to the downfall of a strong competitor. It would be difficult to argue that the transaction should be denied without first considering the changes and role of new developments in that market. In deciding whether or not to allow a merger to take place, the Tribunal will have to go beyond a simple quantitative analysis. Qualitative considerations such as nontariff trade barriers and the ability of management to handle change are equally important, though more difficult to assess.[45] The Act "gives great scope for economic evidence to be introduced."[46] The availability of adequate substitutes, foreign products, or competition, and the existence of tariffs are additional factors, that the Tribunal will have to take into consideration.[47]

An important defense to a finding of lessened competition is proof that gains in efficiency resulting from the merger will outweigh the reduction in competition. Gains to be considered include a significant substitution of Canadian goods for imported ones, a significant increase in the real value of exports, greater economies of scale, and improved distribution

41. Act, *supra* note 1, § 65(b).

42. McKenzie, *Myths and Realities of Corporate Takeovers*, 14 CAN. BUS. REV. 27 (Spring 1987).

43. *Id.*

44. Act, *supra* note 1, § 65(f).

45. GUIDE, *supra* note 9, at 17.

46. Grover & Kwinter, *supra* note 19, at 277.

47. Act, *supra* note 1, § 65.

networks.[48] Unfortunately, the Act does not provide guidance to the Tribunal as to which is to be given greater weight—the substantial lessening of competition or gains in efficiency.[49]

The Act also establishes an exception for joint ventures formed to undertake a particular project or a research and development program. To fall within the exception, the venture must be unincorporated and terminate at the end of the project or program.[50] It must further be shown that due to such things as the risk involved or the need for synergy, the project would not have taken place without the joint venture. The oil and gas sectors represent industries that frequently depend upon joint ventures for the undertaking of exploration. High costs and relatively low probabilities of success make joint ventures attractive.[51] Similarly, the exception for Research and Development (R&D) programs reflects the importance of such activities to Canada's becoming and remaining competitive in world markets. Compared to other industrialized nations, Canada has historically invested little in R&D.[52] It remains to be seen, however, whether the provisions of the Act are sufficiently narrow to prevent the Director from challenging inappropriate ventures before the Tribunal.[53]

If none of these defenses are applicable, and a merger is shown to prevent or substantially lessen competition, the Tribunal may order the dissolution of the merger or the disposition of the shares or assets in question. Concomitantly, if the merger has not taken place, an order prohibiting it can be issued.[54]

C. Case Law

The first case decided by the Tribunal, *Palm Dairies Ltd.*, may shed some light on the future interpretation of the Act. When Palm's owner, Unicorp Canada Corporation, put the dairies up for sale it received five bids, including one from the dairies' management. Unicorp accepted the highest bid, that of a consortium of four western Canadian dairies. Each member of the consortium operated in separate areas, but competed with Palm. If the consortium's proposed acquisition of Palm had proceeded, members of the consortium would have controlled 57 percent of British

48. *Id.* § 68; Guide, *supra* note 9, at 16.

49. Stanbury, *supra* note 17, at 18.

50. Act, *supra* note 1, § 67.

51. Guide, *supra* note 9, at 18.

52. In 1987, for example, Canada spent a mere 1.34 percent of GNP on R&D, or about one-half of what the U.S. spends. *See* Fin. Post, Jan. 25, 1988, at 14, col. 1; *id.* Feb. 8, 1988, at 20, col. 4.

53. Stanbury, *supra* note 17, at 18.

54. Act, *supra* note 1, § 71.

Columbia's fresh drinking milk sales, 80 percent of Alberta's, and 95 percent of Saskatchewan's sales. Not surprisingly, the Director received a substantial number of complaints regarding the acquisitions, including eight from foodstores and twenty-one from fast food and other large restaurant chains.[55]

Before the case was heard by the Tribunal, the Director arrived at a compromise with the consortium, whereby the consortium would purchase 50 percent of Palm, and the dairies' management the remaining 50 percent. A number of other conditions to prevent the lessening of competition were also agreed to. For example, it was agreed that Palm would be run as an independent company and that the consortium would not purchase any additional stakes in Palm. The Director then presented the agreement to the Tribunal for approval. The Tribunal, however, refused to accept the agreement. Not only was the Tribunal not satisfied that adequate competition would remain, it also queried the feasibility of administering the consortium's undertakings. The Tribunal therefore refused to allow the merger to proceed.[56]

The Director's handling of the case has not gone without criticism. It has been argued that the Director ought to have issued an advance ruling certificate thereby eliminating the need for a Tribunal hearing. The Director, however, has contended that various undertakings could not be adequately contained in an advance ruling certificate. One cannot help but wonder whether the number of protests surrounding the case did not propel the Director into bringing this case before the Tribunal.[57] Whatever the reason, the *Palm Dairies* decision is significant for parties involved in Canadian mergers, acquisitions, and amalgamations. It encourages companies to seek advance ruling certificates so as to avoid going before the Tribunal.

In the case of the *Director of Investigations & Research v. Sanimal Industries, Inc.* the Director applied to the Tribunal for the dissolution of two interrelated mergers due to the substantial lessening of competition. As a result of two acquisitions, Sanimal Industries Inc. gained control, via subsidiaries, of 90 percent of the market for collecting rendering meat within the Province of Quebec. After the acquisitions, Alex Couture, Inc., the subsidiary with the largest market share, advised its suppliers that the price it paid for rendering material would decrease and that, in some

55. *First Merger Application Under New Act*, 7 CAN. COMPETITION POL'Y REC., pt. 3, at 4 (1986) [hereinafter *First Merger*]; Hunter, *supra* note 12; Oxtoby (1987), *supra* note 12.

56. *First Merger*, *supra* note 55; Hunter, *supra* note 12; Oxtoby (1987), *supra* note 12. Section 78 of the Act permits the Tribunal to reject an agreement if it would be ineffective in achieving its intended purposes.

57. Oxtoby (1987), *supra* note 12.

cases, a delivery charge would be imposed. The remaining 10 percent of the market was controlled by a single competitor whose operations were concentrated in the Montreal area. That competitor was only able to handle certain types of rendering. Hence, on the surface, it would appear that competition had been virtually eliminated. The Director argued that entry into the meat-rendering market was restricted by a number of economic factors. For instance, transportation costs and the perishable nature of the product made it difficult for those operating in neighboring provinces to service the market from their home base. Economies of scale and surplus capacity made it necessary to enter the market at a high production level.[58] The case will therefore require the Tribunal to deal with such qualitative factors as barriers to entry into the market and the actual, as opposed to theoretical, extent of competition prior to the mergers.

The case is expected to be stalemated for some time as Alex Couture, Inc. and Sanimal have brought a suit before the Quebec Superior Court attacking the constitutionality of the relevant sections of the Act. Alex Couture, Inc. and Sanimal have argued that the Act deals with matters that lie exclusively within the jurisdiction of the provinces. Should they succeed with their attempt to stay proceedings before the Tribunal until the court can decide the constitutionality of the Act, the Director's ability to enforce the provisions of the Act will be seriously hampered.[59]

D. Advance Rulings

Section 74 of the Act allows the Director to issue an advance ruling certificate when he feels that a merger is not likely to eliminate or substantially lessen competition. If the merger is substantially completed within one year after the issuance of the certificate, the Director cannot then bring suit to block or dissolve the merger on the basis of the same, or substantially the same, information upon which the ruling was first issued.[60] One commentator has noted that the Director "is reluctant to issue such a binding document when reality may not bear out the pre-transaction forecasts included in a request for an Advance Ruling

58. C.T. 2 (1987); Blakney, *Merger Application: Quebec Meat Rendering Industry*, 8 Can. Competition Pol'y Rec., pt. 2, at 10 (1987).

59. Hunter, *Constitutional Validity of Competition Tribunal Act and Competition Act Challenged*, 8 Can. Competition Pol'y Rec., pt. 2, at 11 (1987). The plaintiffs obtained an interlocutory injunction suspending the Tribunal hearing until October 1, 1987, by which time the case was to have been heard by the Superior Court of the Province of Quebec. As of December 31, 1987 no decision on the merits had been rendered. Le Procureur Général du Canada v. Alex Couture Inc. et autres et Le Tribunal de la Concurrence et autres, 1987 Receuils de Jurisprudence du Québec [R. J. Q.] 1971.

60. Act, *supra* note 1, § 75.

Certificate."[61] In that situation, instead of issuing an advance ruling certificate, the Director can issue a "comfort letter," that is, a nonbinding preliminary opinion on the proposed merger. A comfort letter does not preclude the Director from subsequently challenging the merger before the Tribunal.[62]

Although the Act does not prescribe specific time limits for the Director's reply to a request for an advance ruling, the Director is required to proceed as expeditiously as possible.[63] If the Director and the Bureau are handling a number of investigations or find the situation described under the proposed ruling request less than clear cut, lengthy delays in obtaining a certificate may result.[64]

IV. Prenotification

The Act provides for prenotification of large mergers as post-merger remedies are unlikely to restore competition to exactly the same level or state as existed before these mergers. This approach is consistent with that taken by other countries such as the United States, Australia, Japan, and West Germany.[65]

The Act provides that all persons, defined to include individuals, companies, or unincorporated entities, who possess Canadian assets or who have annual gross sales revenue in, from, or into Canada, exceeding $400 million, may be subject to the prenotification provisions.[66] The originally proposed threshold of $500 million dollars was reduced in the wake of lobbying by small firms. The $400 million threshold goes against big business's opinion that even a $500 million threshold is too low to prevent unnecessary government intervention.[67]

The prenotification requirement is triggered when a person proposes to acquire control, directly or indirectly (*e.g.* through acquisition of the parent corporation), of an operating business, the assets or gross sales

61. Addy, *Competition Act: Effective Tool or Bureaucratic Nightmare?*, 14 CAN. BUS. REV. at 34 (Winter 1987).

62. *Id.*

63. Act, *supra* note 1, § 74(2).

64. Addy, *supra* note 61.

65. GUIDE, *supra* note 9, at 19; Roberts & Hewatt, *Pre-Merger Notification in Canada*, 11 CAN. BUS. L.J. 135 (1985).

66. Act, *supra* note 1, § 81.

67. GUIDE, *supra* note 9, at 6; Anderson, *supra* note 40; Oxtoby, *supra* note 40. By the end of 1987 the Director and the Bureau had reviewed approximately one-third of the 1,300–1,400 mergers reported since the Act came into force. It has been argued that the merger threshold test is therefore too low, Macdonald & Rowley, *Toward a Realistic Policy on Mergers*, Fin. Post, Jan. 11, 1988, at 14, col. 2. *Contra* Stanbury, *No Changes Needed in Merger Policy*, Fin. Post, Feb. 8, 1988, at 16, col. 2.

revenue of which exceed $35 million. Control is considered to be 20 percent of the voting shares of a publicly traded company or 35 percent for a private company. If the acquisitor already owns at least 20 percent of the voting shares, the prenotification requirement is increased to 50 percent.[68] Since the Act only refers to voting shares, it must be concluded that the acquisition of nonvoting shares does not require prenotification.[69] When two or more corporations intend to amalgamate, the asset or gross sales revenue threshold is increased from $35 million to $70 million.[70]

The prenotification provisions also apply when two or more persons form an unincorporated combination (for example, a limited partnership) to carry on an existing business that has $35 million in assets or gross sales revenue.[71] The Act, however, provides exemption for a combination that does not result in a change of control over any party and whose range of activities is restricted by a written agreement between the parties. The agreement must also set out the parties' obligations to contribute assets, the rules and regulations of the ongoing relation, and must provide for an orderly termination.[72] The exemption for combinations appears to be broader than the one provided under the general merger provisions since the Act provides that the purpose of the combination need not be limited to research and development programs or to special projects that would not otherwise occur.[73]

The prenotification rules were intended to guarantee a prescreening whenever large firms make a major acquisition. As written, however, the rules would not appear to cover acquisitions by most conglomerates. For example, the prenotification rules would not apply to a situation in which a conglomerate worth less than $400 million wanted to purchase control of an operating business worth much more than itself. While a conglomerate may not dominate in a given field, the relatively small number of players in the Canadian business establishment implies that the conglomerate may actually have a strong voice in that sector even before the merger. This omission may prove to be an important oversight in the Act.[74]

The prenotification rules represent an additional hurdle for non-Canadian firms seeking to establish or extend their Canadian operations. The first hurdle involves the Investment Canada Act. Any non-Canadian

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68. Act, *supra* note 1, § 82(2), (3). An "operating business" is defined as one to which employees employed in connection with the undertaking ordinarily report.
69. Grover & Kwinter, *supra* note 19, at 284.
70. Act, *supra* note 1, § 82(5).
71. *Id.* § 82(4).
72. *Id.* § 84.
73. Grover & Kwinter, *supra* note 19, at 286.
74. Stanbury, *supra* note 17, at 15.

wishing to take over a Canadian firm with assets or sales of $5 million or more must first seek approval of the Canadian Investment Agency.[75]

Unlike its predecessor, the Foreign Investment Review Agency, the Investment Canada Agency has yet to refuse any proposed investment.[76] Indeed, the objective of the agency is to foster investment in Canada rather than protect Canadian industry against foreign ownership.[77] Pursuant to the Canada-U.S. Free Trade Agreement, the intervention of the Investment Canada Agency will be substantially reduced. The takeover review threshold will be raised from the current $5 million, reaching $150 million by 1992. Moreover, the review of indirect takeovers of domestic Canadian firms by U.S. firms will be abolished after 1992.[78]

In contrast, the Act seeks to protect all Canadian industries, whether foreign-owned or not, against abuses and the substantial lessening of competition. Therefore, even with free trade, U.S. businesses seeking to operate in Canada will still be subject to the Act.

The different mandates of the two bureaus was highlighted in the takeover of Woodward's Alberta and British Columbia foodstores by Canada Safeway Ltd., a subsidiary of an American supermarket chain. While the Investment Canada Agency approved the transaction, the Director insisted that Safeway dispose of twelve out of the twenty-three stores being acquired, over a period of two years. If Safeway had not accepted these terms, it would have been faced with the expense and publicity of a Tribunal hearing on the takeover.[79] The Safeway agreement suggests that much of the application of the Act is likely to go on behind closed doors, through a process of negotiation. The Director has, in fact, signaled his receptivity to such discussions.[80] The advance ruling provisions of the Act also foster such activities.[81]

Negotiations can, however, be time-consuming. When a firm anticipates that the Director may have competitive concerns about its proposed merger, it would be well advised to consult the Director prior to filing its prenotification notice and far in advance of its targeted closing date.[82]

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75. Investment Canada Act, ch. 20, Stat. Can. § 14 (1985).

76. Gherson, *Eased Takeover Rules Spark Interest in the U.S.*, Fin. Post, Oct. 12, 1987, at 3, col. 1.

77. Investment Canada Act, *supra* note 75, § 14.

78. Canada-United States Free Trade Agreement Implementation Act, Schedule-Part A, Bill C-130, 33d Parl., 2d Sess., art. 1607.3, annex 1607.3, § 2 (1988).

79. Hatter, *supra* note 13; *Canada Safeway/Woodwards Merger Agreement with Bureau of Competition Policy*, 8 CAN. COMPETITION POL'Y REC., pt. 2, at 7 (1987).

80. Hatter, *supra* note 13; *Goldman Elaborates His Views on Compliance*, 8 CAN. COMPETITION POL'Y REC., pt. 2, at 13 (1987).

81. Act, *supra* note 1, § 74.

82. Addy, *supra* note 61, at 34–37.

Not all firms, however, are willing to compromise. Indeed, the Director has noted that the threat of a Tribunal hearing has lead to the abandonment of several potential mergers.[83]

Firms that are required to comply with the prenotification provisions may opt between the short-form and the long-form notice. Both forms require a firm to supply information regarding the assets, revenues, and business activities of the acquiror. Use of the long form, which requires more detailed information, precludes the Director from requesting additional information and the concommitant delay entailed in gathering such additional information. If a person opts to file the short form, the Director may, within seven days, require him to file the longer form. The Director is required to respond in seven days for a short-form notice or in twenty-one days for a long-form notice as to whether or not he intends to challenge the proposed merger before the Tribunal. The one exception to the long-form delay involves an acquisition of shares through a stock exchange. In that instance, the delay is reduced to ten days, or to such longer delay as may be prescribed by the exchange, but not longer than twenty-one days.[84]

Some doubt has been expressed as to whether the delays are sufficient for a proper review. The experience of the United States and Australia suggests that the delays may not be sufficient. The $400 million threshold is supposed to reduce the potential number of requests to a small and therefore manageable number. On the other hand, the purpose of the threshold is to help ensure that the Director reviews the most critical transactions. Yet, by definition, these are likely to be amongst the most complex and may well require a longer review period than that provided under the Act.[85]

V. Conspiracy

Price-fixing and other conspiracies in restraint of trade have long been penal offenses under Canadian anticombines legislation. The Act, however, strengthens this legislation. The Act substantially increases available penalties in an effort to create a greater deterrent. The maximum fine per offense has risen from $1 million to $10 million. Moreover, the Crown's burden of proof is lightened. The Crown no longer has to demonstrate that the conspiring parties intended to unduly lessen competition. It is sufficient to show that the parties intended to and entered into a conspiracy and that their behavior lessened competition unduly (or would have done

83. Hatter, *supra* note 13.
84. Act, *supra* note 1, § 95.
85. GUIDE, *supra* note 9, at 19; Roberts & Hewatt, *supra* note 65.

so if the conspiracy had been put into effect).[86] This change corrects the uncertainty that arose out of the courts' previous interpretation of the Crown's burden of proof.[87]

Even with this clarification, proving a conspiracy is still far from easy. Frequently no oral or written communications exist to suggest a conspiracy. There may simply be an understanding or a meeting of the minds. The evidence is likely to be circumstantial. Assessing the significance of various events and of firms' behavior can, therefore, be problematic.[88]

One commentator has criticized the continued use of the word *unduly* in regards to price-fixing. Only in the case of banks is price-fixing deemed to be a per se offense, regardless of whether or not it unduly lessens competition. Given the narrow interpretation that courts historically have given to the word *unduly,* the commentator argued that the per se rule ought to have been applied to all forms of business. In maintaining the distinction, the legislature deferred to the business community, which had opposed strengthening the price-fixing offense.[89]

In the spirit of fostering the growth of export markets and international trade for Canadian products, the Act provides for two exceptions to the conspiracy offenses. The first exception deals with export agreements entered into by legitimately formed consortia that inadvertently unduly lessen competition in Canada. The formation of a consortium may reduce the volume of exports while simultaneously increasing the price of these exports, thereby creating a net benefit in favor of the Canadian economy. Accordingly, an offense will be deemed to have been committed only if the real value of exports is, or is likely to be, reduced or limited.[90] The defense will not be available to a consortium, however, when the export agreements are so closely tied to domestic activities that it is impossible to separate the two.[91]

The second exception to the conspiracy offense deals with specialization agreements. The Act defines a specialization agreement as an agreement between two or more parties that each will discontinue certain services or products and then exclusively buy those services or products from the other party. As long as the parties can show that the gains in efficiency offset the lessening or preventing of competition, the Tribunal shall consent to register a specialization agreement. The Act specifies that

86. Act, *supra* note 1, § 32.

87. GUIDE, *supra* note 9, at 27; *see, e.g.,* Atlantic Sugar Refineries v. A.G. Canada, 115 D.L.R. 21 (1980), 54 C.C.C.92d 373; *see also* Aetna Ins. Co. & 72 Other Corps v. The Queen, 75 D.L.R.3d 332 (1977).

88. Stanbury, *supra* note 17, at 20.

89. *Id.* at 28–29; Stanbury, *Half a Loaf: Bill C-29,* 10 CAN. BUS. L.J. 1, 20–21 (1985).

90. Act, *supra* note 1, § 32(5)(a).

91. *Id.* § 32(4); Grover & Kwinter, *supra* note 19, at 301.

a mere income redistribution does not demonstrate a gain in efficiency. The Tribunal must consider if the particular specialization agreement will either significantly increase exports or produce a significant substitution of domestic services or products for those that were previously imported.[92] Failure to register will not make the consortium illegal, it merely leaves it open to penal suit.[93]

Unfortunately, the Act does not provide any guidelines for the duration of registrations. The establishment of a specific time limit, with the possibility of an extension after a review of the situation, would have been helpful. It would have ensured that these types of agreements do not continue long after they have outlived their usefulness.[94]

VI. Conclusion

In an era in which much is being made of global markets and free trade, it may seem surprising that Canada has taken the trouble to modify its competition legislation. Yet, the new Act becomes more comprehendable when one considers the substantial levels of corporate concentration and of oligopolies in Canada. Canadian legislation needed to be updated to correspond with the equivalent rules in other Western industrialized nations. The previous Combines Investigation Act had not been substantially changed for a number of years.

The strengthening of the provisions dealing with mergers and with the abuse of a dominant position should facilitate the review of and, when needed, intervention into these activities. Since few cases have gone before the Tribunal, it is too early to assess the Tribunal's impact on regulating competition. Nevertheless, the Director's willingness to discuss and arrive at compromises, as demonstrated by such cases as *Safeway* and *Palm Dairies,* implies that compromise is preferred to litigation. It is to be hoped that the Act will serve as an effective but not excessive safeguard of Canadian competition.

92. Act, *supra* note 1, § 57.
93. Stanbury, *supra* note 17, at 27.
94. *Id.* at 35.